January 25, 2018

Ms. Roxanne Rothschild
Acting Executive Secretary
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570-0001

By electronic submission: Regulations@nlrb.gov

Re: RIN 3142-AA13; The Standard for Determining Joint-Employer Status; Notice of Proposed Rulemaking

Dear Ms. Rothschild:

The National Retail Federation ("NRF") submits these comments in response to the National Labor Relations Board's ("NLRB" or "Board") Notice of Proposed Rulemaking and Request for Comments regarding The Standard for Determining Joint-Employer Status, 83 Fed. Reg. 179 (Sept. 14, 2018) ("Proposed Rule"). This submission provides NRF's views on the Proposed Rule and the beneficial impacts the changes would have on the retail community. For the reasons outlined below, NRF encourages the Board to adopt the Proposed Rule, but with the addition of several clarifying definitions which NRF believes will help to clarify the scope of the Rule.

NRF is the world's largest retail trade association, representing all aspects of the retail industry. Its membership includes discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and Internet retailers. Retail is the nation's largest private sector employer, supporting one in four U.S. Jobs – 42 million working Americans. Contributing $2.6 trillion to annual GDP, retail is a daily barometer for the nation's economy. NRF regularly advocates for the interests of retailers, large and small, in a variety of forums, including before the legislative, executive, and judicial branches of government. Nearly all of NRF's members qualify as "employers" under the National Labor Relations Act (the "Act") and therefore stand to be affected by the outcome of the Board's rulemaking proposal.

The Proposed Rule would provide a clear, understandable and stable standard for determining whether two businesses have established a joint employer relationship with respect to the employees of one of those businesses. The Proposed Rule's fundamental requirement that to be a joint employer, a business must actually exercise control over the essential terms and conditions of employment, is consistent with decades of Board precedent and represents a reasonable application of the common law of agency within the context of joint employment. The retail

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industry has a strong desire for clarity in this area of the law, as retailers regularly contract with third-party business partners to facilitate myriad aspects of their businesses. Thus, the industry would benefit from a predictable standard that allows retailers to structure their business relationships without triggering unintended joint employer liability. NRF is well-positioned to comment on the Proposed Rule, as it represents retailers of all types, and therefore has unique insight into how the Proposed Rule will benefit retailers, their employees and the economy as a whole.

I. The Proposed Rule Would Provide for Predictability, Clarity and Stability in the Application of the Board's Joint Employer Standard

NRF supports the Proposed Rule because it seeks to establish a clear and workable standard for determining joint employer status and believes that using the rulemaking process to establish the standard will help stabilize this important area of the law. The practical requirement that a business must actually exercise meaningful control over the essential terms and conditions of another employer's employees before the business can be found to be their joint employer would be easier understand and apply in practice. Retailers, their business partners and their employees would benefit from such improved stability.

The Proposed Rule's requirement for actual, exercised control provides affected parties with a clearer understanding of what types of actions will trigger joint employer liability. Since the Proposed Rule would only find joint employer status when a retailer actually and directly exercises control over essential terms and conditions of employment like hiring, firing and rates of pay, retailers can structure their relationships so their contract partners retain exclusive control over these fundamental aspects of their employees' jobs. Thus, retailers and their business partners will know with specificity the types of control each party may exercise if they wish to maintain their independence with respect to the other's employees.

Additionally, the Proposed Rule's exclusion for control that is "limited and routine" ensures that retailers who enter into business relationships with contractors, staffing companies or logistics providers are able to maintain some minimal level of oversight over the contracted services, whether for legal or practical reasons. This exception would allow retailers to reserve control over important business matters such as store appearance, hours of operation, product quality and safety and customer service without fearing unintended—and, in some cases, unknowable—liabilities and obligations that attend joint employer status. The exception is also consistent with the common law of agency, which does not consider these limited and routine forms of contractual control probative of joint employer status.[1]

In order to provide the Board with as broad an array of retailer insights as possible, NRF conducted a benchmarking survey to gauge how its members are assessing the potential impacts of the Proposed Rule.

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[1] *Browning Ferris Indus. of Cal., Inc. v. NLRB*, No. 16-1028 (D.C. Cir. Dec. 28, 2018) (finding "routine contractual terms" can be "too close to the routine aspects of company-to-company contracting to carry weight in the joint-employer analysis").

In response, retailers articulated some of the benefits they anticipate from adoption of the Proposed Rule:

- "It would allow us to enter into traditional third-party vendor relationships with more clarity and comfort about the possible consequences. This is particularly important in retail where turnover and seasonal fluctuations in labor needs require that we explore all options for filling openings."

- The Proposed Rule would provide "[i]ncreased agility to respond to changing business needs."

- "[The Proposed Rule] would allow us to outsource to specialists the areas of our business where we've struggled operationally."

- The Proposed Rule would help "streamline" the processes used by retailers "for acquiring new consultants or contractors."

As these responses demonstrate, retailers value predictable legal standards around which to structure their business arrangements. The Proposed Rule encourages retail businesses to maintain, or even grow, the business relationships that have helped the retail industry become a lynchpin of our country's economy.

II. The Proposed Rule Would Address Real-World Problems Retailers Encounter in Structuring their Business Relationships

The Proposed Rule purports to address many of the problems that an unclear and expansive joint employer standard presents to the many NRF members who routinely contract with third-party businesses for labor or other services. For example, retailers routinely engage logistics operators to manage their warehouses efficiently, to make deliveries or to contract with third-party service vendors (such as food services, IT and janitorial contractors) to service their facilities. They also frequently rely on landscape, snow removal, maintenance, security and other building service contractors to maintain their properties in a condition that will appeal to consumers and ensure compliance with federal and state laws regarding public and workplace safety and access for individuals with disabilities. Many retailers also lease space to independent vendors who sell their own products—such as cellular phones and other electronic devices, athletic shoes, sunglasses or leather goods—on the retailer's premises. Almost all of these relationships involve some degree of shared control between the parties or reserved control by the retailers over the terms under which the third-party business is performing services or selling products on the retailer's property.

These business relationships are prevalent throughout the retail industry as in many other industries because they allow for specialization, efficiency and enhanced productivity. As part of the aforementioned survey, NRF obtained data regarding retail members' use of contractors or other similar business partners. Of those who responded:

- More than 70 percent of respondents use temporary personnel supply services;

- More than 35 percent of respondents use transportation or shipping contractors;
- More than 35 percent of respondents use facilities or equipment maintenance and service contractors;
- 50 percent of respondents use contractors at their distribution centers and warehouses;
- More than 70 percent of respondents use information technology network, website or help desk contractors;
- More than 35 percent of respondents use customer service call center or online customer assistance contractors.

In the course of dealing with these third-party businesses, retailers may exercise certain limited types of oversight regarding their work product. For example, if a retailer leases space in its store to an independent vendor, the retailer necessarily affects the hours of operation the vendor can operate—it cannot remain open beyond the business hours of the retail establishment in which it operates. This necessarily influences how long the vendor's employees can work on a given day. As another example, if a retailer engages a construction contractor to upgrade or remediate problems with a retailer's physical space, that retailer must evaluate the contractor's work to ensure it meets standards and allows the retailer to comply with local, state and federal laws. For instance, if the contractor's employees build a doorway that is too narrow to accommodate individuals in wheelchairs, the retailer has an obligation to exercise some type of control to fix the problem. In yet another example, if a retailer engages a snow removal service to clear snow from its property during the winter months, and that service's employees fail to clear snow from around a primary store entrance, the retailer may have to insist that the job be completed properly. The exercise of these types of controls over a retailer's own property should not turn that retailer into a joint employer.

At the corporate level, retailers may exercise or retain other types of even more attenuated controls over business partners. For example, many retail businesses require that their supply chain partners comply with federal, state and local labor and workplace safety laws or adopt corporate social responsibility policies. Grocers and restaurant chains often require their suppliers to meet food safety and quality standards. These kinds of initiatives help to create safe and lawful workplaces for employees all along the supply chain and ensure consumers are buying sanitary and quality products. None of these types of controls—which help to protect the integrity of the retailer's business and brand—should turn a business into a joint employer. The Proposed Rule makes that distinction clear, while the current standard leaves employers uncertain of their joint employer status.

Retailers do not hire, fire or discipline any of the employees of its business partners. The essential terms and conditions of the employees of these businesses are controlled by their employers, not the retailers. If engaging in the kinds of actions described above could create joint employer liability, this would threaten the viability of many retail business relationships. Indeed, multiple

respondents to NRF's survey reported discontinuing partnerships with service providers or contractors due to the lack of clarity concerning potential joint employer liability.

The Proposed Rule would help to solve these problems by enabling retailers to continue these well-established business relationships under clear rules without assuming liability for entirely different classes of workers, over whom they exercise no control. Both the substance of the rule—allowing for some limited, routine or reserved control by retailers over the employees of their contract business partners—and the form of the rule—providing a black-letter standard for joint employer liability—will provide practical solutions for retailers concerned about the viability of their traditional and successful business models.

III. The Proposed Rule is Consistent with the Act's Congressional Intent

The history underlying passage of the Taft-Hartley Act and the decisional law of the last sixty years support the Board's Proposed Rule. Direct, exercised control has always been a fundamental aspect of the joint employment relationship, even where less significant indicia of control have functioned to create employment relationships in other contexts. The Board should not apply the same standard used for determining whether a worker is an independent contractor or an employee when evaluating the question of joint employment. The inquiries are fundamentally different, and the common law, legislative history and established precedent recognize the importance of the distinction. The Proposed Rule's requirement of direct, exercised control to establish a joint employer relationship properly considers common law agency principles, best accomplishes the goals of the Act and has previously been deemed acceptable by the courts.

A. The narrow, specific intent of Taft-Hartley

Congress enacted Taft-Hartley in 1947 to, among other things, exclude independent contractors from the definition of "employee" under Section 2 of the NLRA.[2] Congress acted in response to the Supreme Court's decision in *NLRB v. Hearst Publications*,[3] in which the Court determined that the legislature intended to include certain types of independent contractors as employees under the Act.

The Court in *Hearst Publications* based its decision on the general remedial purposes of the Act and its goal of providing more American workers with meaningful opportunities to bargain over the terms and conditions of their employment. Based on the structure, purpose and legislative history of the Act, the Court determined: "Congress…was not thinking solely of the immediate technical relation of employer and employee" when it passed the Act, and concluded "Congress had in mind a wider field than the narrow technical legal relation of 'master and servant.'"[4]

[2] 61 Stat. 136, 73 Stat. 519, 29 U.S.C. s 151 et seq

[3] *NLRB v. Hearst Publications*, 322 U.S. 111 (1944).

[4] *Id.* at 124.

Essentially, the Court adopted an "economic realities" analysis to determine coverage under the Act. [5]

By enacting Taft-Hartley, Congress expressly narrowed the broader application taken by the Supreme Court in *Hearst Publications*. The amendment expressed Congress's policy decision to regulate parties engaged in traditional employment relationships. To accomplish this goal, Congress sought to incorporate elements of the common law master-servant relationship to distinguish employees from independent contractors under the Act.[6] But the fact that Congress tasked the Board to apply common law agency principles to the definition of "employee" under the Act does not preclude the Board from imposing a higher standard to determine whether a given employer is subject to joint employer liability under the Act.

Indeed, at the time of Taft-Hartley's passage, Congress could not have foreseen whether or how common law agency principles might apply to a joint employment inquiry. The amended definitions in Taft-Hartley focused narrowly on legislatively overruling *Hearst Publications* and clarifying that independent contractors were not included in the Act's definition of "employee." As the Supreme Court later acknowledged in *N. L. R. B. v. United Ins. Co. of Am.*, "the obvious purpose of this amendment was to have the Board and the court apply general agency principles in distinguishing *between employees and independent contractors* under the Act."[7]

B. Board and case law establish a standard for joint employment

As the decades passed, the Board and the courts decided cases involving the application of the Act to situations involving multiple employers with some control over the same employees. In *Greyhound Corp.*, 153 NLRB 1488 (1965), the Board found a joint employment relationship because Greyhound and its maintenance company "share[d], or codetermine[d], those matters governing the essential terms and conditions of employment." Notably, the Board relied on evidence of actual, exercised control to reach its holding. For example, the Board found "porters [were] given detailed supervision" by Greyhound personnel, Greyhound's managers conferred with the contractor to set work schedules and determine the number of employees required to meet those schedules, the contractor's employees received work instructions directly from Greyhound's terminal officials and, on at least one occasion, Greyhound made its contractor fire a porter it deemed an unsatisfactory worker.[8]

The Board considered the same key factors in subsequent decisions to determine whether a joint employment relationship existed: whether two or more entities "share[d] or codetermine[d]"

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[5] *Id.* at 127-28.

[6] H.R. Rep. No. 245, at 18, 80th Cong., 1st Sess. (1947)("[Employee], according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire…[and who] work for wages or salaries under ***direct supervision***.") (emphasis added).

[7] *N. L. R. B. v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968).

[8] *Greyhound Corp.*, 153 NLRB 1488, 1496 and n.8 (1965).

essential employment terms through the actual exercise of joint control that directly affected such matters.[9] Federal courts expressed approval of the *Greyhound* standard and its reliance on actual control.[10] The Third Circuit determined the requirement that joint employers "exert significant control" over the same employees represented a reasonable interpretation of the Act.[11]

The dissent to the Proposed Rule attempts to argue that the Board's hands are tied by Congress and it cannot use its knowledge of contemporary business realities and historical precedent to determine a reasonable standard for joint employer liability. While it is true that the D.C. Circuit Court recently found that the Board's rule must color within common law boundaries, the Board has latitude to use its policy expertise to craft an appropriate application of joint employment under the Act.[12] Because the Proposed Rule reasonably incorporates common law principles, it is permissible even though it involves a more rigorous standard of proof than the test to distinguish between employees and independent contractors.

IV. The Proposed Rule Can Be Strengthened Through the Use of Clear Definitions[13]

NRF supports the Proposed Rule but believes the Board can improve the rule and its future application by codifying definitions of key terms. The primary benefit of the Proposed Rule is its bright line requirement for meaningful, actual control over essential terms and conditions of employment. To provide clear guidance and "scaffolding" around the rule, the terms "substantial control" and "essential terms and conditions of employment" should be defined.[14] If it adopts a

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[9] *See, e.g., Hamburg Industries, Inc.*, 193 NLRB 67 (1971) (Board found significant that the putative joint employer "constantly checked the performance of the [contract] workers and the quality of work"); *Clayton B. Metcalf*, 233 NLRB 642 (1976) (finding significant indicia of control where the mine operator held "day-to-day responsibility for the overall operations" of the worksite, including the assignments of the subcontractors); *Sun-Maid Growers*, 239 NLRB 346 (1978) (Board found joint employer status when contract workers were assigned work and supervised directly by Sun-Maid supervisors rather than the contracting company.)

[10] *N. L. R. B. v. Greyhound Corp. (S. Greyhound Lines Div.)*, 368 F.2d 778, 781 (5th Cir. 1966) (approving Board's holding in *Greyhound. Corp.*, 153 NLRB 1488); *N.L.R.B. v. Browning-Ferris Indus. of Pennsylvania, Inc.*, 691 F.2d 1117, 1124 (3d Cir. 1982) ("We hold therefore that in the context of this case, the Board chose the correct standard-the 'joint employer' standard-to apply to its analysis of the facts of this case: where two or more employers ***exert significant control*** over the same employees-where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment-they constitute 'joint employers' within the meaning of the NLRA.") (emphasis added).

[11] *Id*.

[12] *Browning Ferris Indus. of Cal., Inc. v. NLRB*, No. 16-1028 (D.C. Cir. Dec. 28, 2018) (finding that the Board must "color within the common-law lines" in crafting a rule on the application of joint employment to the NLRA).

[13] The definitions proposed below largely reflect those proposed by the Coalition for a Democratic Workplace ("CDW") in its own Comment. NRF is a co-signatory to CDW's Comment and believes CDW's proposed definitions similarly represent a sound and user-friendly clarification of the Proposed Rule.

[14] The term "direct and immediate" control, as used in contrast with "indirect" control, has been the subject of some debate. As the definitions below will outline, "direct and immediate" control means the exercise of hands-on decision-making over the day-to-day functions of an employee. The use of the word "direct" is not intended to rigidly exclude actions taken through a third-party intermediary if they are specifically directed by an employer.

clear definition of the term, the Board can better achieve the certainty that employers need to operate predictably and efficiently and that the Board needs to adjudicate fairly and consistently.

As written, the Proposed Rule includes examples to guide employers and the Board with respect to essential terms and conditions and includes the "such as" list of hiring, firing, discipline, supervision and direction.[15] While helpful, even some of those terms, like "direction," leave too much room for interpretation and manipulation. NRF suggests the inclusion of the definitions set forth below to outline explicitly those terms and conditions the Board considers central to an employment relationship.[16]

A. NRF proposes the following definition of "essential terms and conditions of employment:" "Essential terms and conditions of employment" shall mean the hiring, promotion, discipline and discharge of employees; determination of individual employee rates of pay and benefits; engaging in day-to-day supervision of employees; and directly assigning particular employees their individual work schedules, positions and tasks."

The clear limits of this definition benefit employers by providing certainty about the types of decisions each can undertake without sacrificing independence and triggering a joint employer relationship. Further, they will allow the Act to operate consonant with other federal laws that may require a retailer to exercise some limited forms of control over a contractor or its employees.[17] Still, on a daily basis, the retailers will not control the essential terms and conditions of their partners' employees. Retailers may inherently control the hours a vendor can operate in the retailer's store or the amount of square footage a snow removal worker must cover, but they do not dictate when individual employees work, how much they earn or whether they progress in their job. The Proposed Rule and limiting definition will allow retailers to exercise limited control over some aspects of the work their contractor's employees perform, but it will not immunize them if they step in to control the terms and conditions fundamental to a traditional employment relationship.

Of course, retailers may need to impose routine contractual requirements for the completion of a contractor's work to ensure it meets the contracted-for standards, but that supervision is not akin to providing direct, day-to-day instructions to a contractor's employees or assigning them particular tasks. Again, from an employee's perspective, the party in charge of their particular work schedules and specific assignments controls the essential terms and conditions of their

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[15] The Standard for Determining Joint-Employer Status, 83 Fed. Reg. 46681, 46696 (Sept. 14, 2018) (to be codified at 29 C.F.R. 103).

[16] NRF co-signed a Petition to the Board submitted earlier this summer advocating for a new joint employer rule. *See In the Matter of Proposed Rule to Establish the Standard for Determining Joint-Employer Status under the National Labor Relations Act*, Rulemaking Petition, June 13, 2018. The definitions proposed in this Comment are the same as those set forth in the Rulemaking Petition.

[17] *See, e.g.*, 15 U.S.C.A. § 1127 (defining standards for trademark abandonment and requiring businesses to exercise sufficient control over their brands to maintain trademark protection).

employment. It is not sound policy to require a secondary business to engage in bargaining merely because it maintains—as it must—the right to determine whether the contractor or business partner and its employees have fulfilled their contractual duties to provide a defined product or service. Such routine control is inherent in the business relationship and does not constitute control over essential terms and conditions of employment.[18]

B. NRF further proposes an explicit list of types of routine control that should not qualify as "substantial control affecting essential terms and conditions of employment." The addition to the rule would state:

"Substantial control affecting essential terms and conditions of employment" shall not include any of the following: actions, policies, training or programs intended (1) by any franchisor to maintain or enforce the brand protection standards required of persons who enter into franchising agreements with such franchisor; (2) by any entity to require, implement or administer any social responsibility code or policy, including safety and security policies, with respect to suppliers, subcontractors, vendors or other entities with whom it has a business relationship; (3) by any entity to require compliance by its suppliers, subcontractors, vendors or other entity with whom it has a business relationship with any federal, state or local law, regulation or other legal requirement; (4) by any entity to require and establish time parameters when the activity or work in question is to be performed; (5) by any entity to require and establish quality or outcome standards for any activity or work performed for such entity; (6) by any entity to require an individual to wear any type of uniform or any other type of identification that mentions in any manner the entity for which the activity or work is being performed, including the entity's brand; (7) by any entity to require, maintain or enforce product, brand or reputational protection standards for its products, goods or services; (8) to implement third party delivery and courier services, or technology-based shared staffing applications (including, but not limited to, insurance, training, financing and leasing services); and (9) by any franchisor to require, maintain or enforce the standardized services, products, processes or product delivery of the business system to which the franchisee has agreed to participate.

Substantial control shall not include optional training programs or optional management and operational tools, including, but not limited to, business consulting and data analysis, that a franchisor or other entity offers to franchisees or other contracting entities.

[18] *Browning Ferris Indus. of Cal., Inc. v. NLRB*, No. 16-1028 (D.C. Cir. Dec. 28, 2018) (finding "[w]hether [an employer] influences or controls the basic contours of a contracted-for service…would not count under the common law.").

> **Retained or reserved, but unexercised control over essential terms and conditions of employment, and/or the exercise of routine indirect control over essential terms and conditions of employment, shall not alone be dispositive of joint employer status.**

These proposed exceptions cover common forms of routine, attenuated control retailers often exercise over contractors or logistics providers that do not affect the essential terms and conditions of employment. For example, retailers need to ensure their contractors complete their work in compliance with federal or state laws applicable to the retailers themselves. One retailer relayed an experience involving sexual harassment of a retailer's employee by a contract partner's employee. Under Title VII, the retailer had an obligation to address the matter with the tenant; however, in addressing the matter, the retailer expressed concern that it risked joint employer liability merely by contacting the contract partner and asking it to remedy the legal violation. Retailers also may provide particular instructions for how logistics providers should deliver goods to ensure brand quality. These types of attenuated control do not affect the promotional opportunities, rates of pay or other essential terms and conditions of the contractor's employees and should not create a joint employer relationship.

These exceptions will further clarify the definition of "essential terms and conditions." The Board cannot list every possible type of control a retailer may exercise or reserve, but this extensive list of common forms of routine control will help businesses structure their affairs and prevent factfinders from expanding the rule to cover areas not intended by the Act or the Proposed Rule.

Because these definitions provide clear limits for the application of the Proposed Rule, NRF suggests including them in addition to the examples currently provided.[19]

V. Conclusion

NRF and its members support the Proposed Rule and encourage the Board to move forward with the rulemaking process. The Proposed Rule represents sound policy for employers and

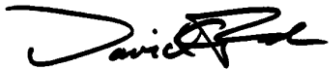
[19] NRF also urges the Board to clarify that the 12 examples in the Proposed Rule serve a limited purpose and are not intended to be dispositive of joint employer status in isolation. Each example provides a sample fact pattern that either does, or does not, illustrate what the Board indicates would constitute an instance of actual exercise of direct and immediate control by a putative employer. But a single instance of the exercise of such control is just one factor in what could in practice be a more expansive fact pattern, with many additional indicia of the exercise (or lack thereof) of control over employment terms not covered in each example. In that regard, the Proposed Rule requires the actual exercise of "substantial direct and immediate control…that is not limited and routine," indicating that a single incidence of exercised control is not, in the ordinary case, dispositive. Thus, the current phrasing of the examples suggests they are included for the limited purpose of determining whether direct and immediate control occurred and are not intended to be dispositive of the more extensive overall joint employer inquiry. The Board should make this clarification in any Final Rule. *See* The Standard for Determining Joint-Employer Status, 83 Fed. Reg. 46681, 46696 (Sept. 14, 2018) (to be codified at 29 C.F.R. 103).

employees, complies with the requirements and the goals of the Act and addresses common problems among employers in one of America's largest industry groups.

NRF urges the Board to strongly consider strengthening its Proposed Rule by clearly defining "essential terms and conditions of employment" to further protect the rule from manipulation or misinterpretation. Ultimately, the stability and predictability provided by the Proposed Rule will benefit retailers, their business partners and the employees of both types of entities. Retailers are an engine of the economy, both as sellers of goods and as employers, and the Proposed Rule will allow them to continue to succeed within a workable regulatory scheme. Therefore, the Board should adopt the Proposed Rule, including of the definitions suggested herein.

Thank you for the opportunity to provide the above information. If you have any questions concerning NRF's comments, please contact Lizzy Simmons at simmonsl@nrf.com.[20]

Sincerely,



David French
Senior Vice President
Government Relations

[20] The law firm of Hunton, Andrews, & Kurth LLP assisted NRF in drafting these comments.